

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24. y

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0343-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MONTE EUGENE JENKINS,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20023878

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Thomas F. Jacobs

Tucson
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 Petitioner Monte Jenkins seeks review of the trial court’s denial of relief on a successive petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P., challenging the propriety of his aggravated sentences, the sufficiency of the factual basis for two of his six guilty pleas, and the effectiveness of counsel. We will not disturb a trial court’s denial of post-conviction relief unless the court has clearly abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). No such abuse occurred here.

¶2 Pursuant to a plea agreement, Jenkins pled guilty to two counts each of attempted second-degree murder, aggravated assault with a deadly weapon, and aggravated assault causing serious physical injury. In February 2004, the trial court sentenced him to a combination of concurrent and consecutive, partially aggravated, ten- and fifteen-year prison terms that resulted in a total of thirty years’ incarceration.

¶3 Jenkins has filed a previous notice of and petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. In his prior, of-right petition, *see generally* Ariz. R. Crim. P. 32.1, Jenkins asserted claims of sentencing error and ineffective assistance of trial counsel and also alleged there was an insufficient factual basis for his guilty pleas to the two counts of attempted second-degree murder. Except for directing the Arizona Department of Corrections to correct its calculation of Jenkins’s sentences, the trial court denied relief. Jenkins sought review of the court’s denial of relief on a single issue, his claim that there was an insufficient factual basis to support his guilty pleas to attempted murder. We granted the

petition for review but denied relief. *State v. Jenkins*, No. 2 CA-CR 2006-0014-PR (memorandum decision filed Sept. 21, 2006).

¶4 In July 2007, Jenkins instituted the current proceeding by filing a second notice of post-conviction relief. Therein, he suggested he intended to assert his prior post-conviction counsel had rendered ineffective assistance.¹ *See State v. Pruett*, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995) (pleading defendant constitutionally entitled to effective assistance of counsel on first petition for post-conviction relief, counterpart of direct appeal, and can thus assert first Rule 32 counsel’s ineffectiveness in second Rule 32 proceeding); *cf. State v. Bennett*, 213 Ariz. 562, ¶¶ 15-16, 146 P.3d 63, 67 (2006) (when same counsel filed defendant’s consolidated appeal and first Rule 32 petition, claim of ineffective assistance of appellate counsel not precluded in second post-conviction proceeding filed by different counsel).

¶5 Although Jenkins’s second notice appears to have been untimely, *see Pruett*, 185 Ariz. at 131, 912 P.2d at 1360 (successive notice timely if filed within thirty days of order and mandate upholding denial of relief on first petition), the trial court appointed counsel, who filed Jenkins’s second petition for post-conviction relief in June 2008. In it, Jenkins asserted the following claims: the trial court improperly relied on Jenkins’s use of

¹In conjunction with his request for appointed counsel for his second petition, Jenkins’s notice states: “Defendant is entitled to the effective assistance of counsel in first Rule 32 of-right proceedings. The Legal Defender’s Office represented defendant in his Rule 32 of-right, and therefore, the Legal Defender’s Office cannot evaluate their own effectiveness under the conflict rules.”

a firearm and infliction of serious physical injury both to enhance and aggravate his sentences, his guilty pleas were not fully informed and voluntary because trial counsel had “advised him that he would receive a sentence of 10 years and failed to inform him of the enhancement and aggravation possibilities,” and trial counsel was ineffective for having so misinformed him about the sentences he could receive. In conclusory fashion in a single paragraph, Jenkins also asserted that “appellate” counsel had been ineffective in not raising the sentencing issue in Jenkins’s of-right Rule 32 proceeding.

¶6 The trial court denied relief, explaining its decision in a detailed minute entry.

First, the court ruled Jenkins’s sentences had been properly enhanced and aggravated:

Petitioner’s sentences on the two counts of Aggravated Assault with a Deadly Weapon were aggravated by the causation of serious physical injury, as well as the motive of pecuniary gain and the presence of an accomplice. Petitioner’s sentences on the two counts of Aggravated Assault causing Serious Physical Injury were aggravated by the use of a deadly weapon, as well as the motive of pecuniary gain and the presence of an accomplice.

Thus, the court noted, on none of the counts had Jenkins’s sentences been aggravated improperly based on a factor that was also an element of the underlying crime in violation of former A.R.S. § 13-702(C)(1) and (2).² Second, the court ruled Jenkins’s ineffective

²Significant portions of Arizona’s criminal sentencing code have recently been renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-119, effective from and after December 31, 2008, *id.* § 120. “[E]xcept for very limited adjustments to the sentence length for repetitive offenders” in certain circumstances, the amendments were “not intended to make any substantive changes to the criminal sentencing laws.” *Id.* § 119.

assistance claim failed because he had established neither that counsel's performance had fallen below an objectively reasonable professional standard nor that Jenkins had been prejudiced by the conduct he alleged was ineffective. *See generally Strickland v. Washington*, 466 U.S. 668, 687 (1984). In denying "Petitioner's claim of ineffective assistance of counsel," the court did not expressly refer to Jenkins's nominal assertion that his first Rule 32 counsel had also been ineffective in failing to raise in the previous post-conviction proceeding the substantive issues that form the real basis of his second petition for post-conviction relief. Jenkins did not move for rehearing or clarification of the trial court's ruling.

¶7 In the current petition for review, Jenkins frames the issue presented as a claim of trial court error at sentencing, not as a wrongly denied claim of ineffective assistance of prior post-conviction counsel. But Jenkins's sentencing claims could and should have been raised in his first Rule 32 proceeding and therefore are precluded. *See Ariz. R. Crim. P. 32.2(a)(3)*. His cursory claim of ineffective assistance of Rule 32 counsel was the only nonprecluded claim mentioned in this successive post-conviction proceeding. *See Pruett*, 185 Ariz. at 131, 912 P.2d at 1360. Yet, so perfunctory was Jenkins's attempt to characterize his substantive claims as claims of ineffective assistance of Rule 32 counsel that, when the trial court ruled only on the underlying, substantive claims, Jenkins did not protest below or seek a separate ruling on the nonprecluded issue. Nor does he even mention counsel's alleged ineffectiveness in his petition for review.

¶8 Accordingly, the trial court did not abuse its discretion in denying post-conviction relief on Jenkins’s precluded claims. Although we grant the petition for review, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge